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MOHD FAIZ ZULKIFLI (A MINOR SUING THROUGH HIS FATHER AND NEXT OF KIN; ZULKIFLI AWANG KECHIK) & ANOR v. ETIQA TAKAFUL BHD

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
B [CIVIL APPEAL NO: 12(A) NCVC-28-10-2015]
3 APRIL 2016

INSURANCE: *Motor insurance – Policy – Avoidance of liability – Insured person involved in accident earlier in morning but purchased policy from insurer's agent later at night – Whether policy only took effect later at night – Whether insured period included past period – Whether insurer could be held liable under policy – Failure of insured person to inform insurer's agent of prior occurrence of accident – Whether non-disclosure misled insurer's agent into believing that vehicle was accident free – Whether insurer's agent accepted payment in utmost good faith – Whether policy should be declared void and unenforceable – Whether insurer protected under s. 96(3) of Road Transport Act 1987*

The respondent ('Etiqa Takaful') filed an originating summons ('OS') at the Sessions Court seeking that a motor vehicle insurance policy issued by Etiqa Takaful ('the policy') be declared void or unenforceable ('the said declaration'). The second respondent in the OS ('Ghozali') was the owner of a motor vehicle PGE 877 ('vehicle PGE 877') which was the vehicle that the policy covered in the event of any loss or damage, including liability for third parties' claims. The first respondent in the OS ('Siti') was also the authorised driver of vehicle PGE 877. On 23 April 2013, around 10.15am, the first appellant ('Mohd Faiz') was riding a motorcycle bearing registration number KCF 7580 when his motorcycle collided with vehicle PGE 877 driven by Siti. The second appellant ('Mohd Redzuan'), was the owner of the motorcycle KCF 7580. The first and second appellants commenced a civil suit against Ghozali and Siti at the Magistrate's Court. However, before trial could begin, Etiqa Takaful had sought for the said declaration. Etiqa Takaful argued that the policy should be declared void or unenforceable for reasons, *inter alia*, that (i) Ghozali had purchased the policy from an agent of Etiqa Takaful at about 8.27pm on 23 April 2013, in the circumstances, the policy only took effect after payment was received by Etiqa Takaful at 8.27pm on 23 April 2013. Since the accident occurred earlier in the day *ie* around 10.15 am on 23 April 2013, the respondent could not be held liable as the insurer in the policy; and (ii) the insured person did not disclose to Etiqa Takaful's agent that vehicle PGE 877 was involved in an accident in the morning of 23 April 2013. This non-disclosure of fact had misled Etiqa Takaful's agent into believing that vehicle PGE 877 was free from accident. Hence, the respondent's agent accepted the payment in utmost good faith. The Sessions Court Judge ('SCJ') allowed Etiqa Takaful's application. Dissatisfied, the appellants appealed.

Held (allowing appeal with costs):

(1) In Etiqa Takaful's document entitled 'The Schedule' and 'Private Car Certificate', it was clearly stated that the insured period was between 23 April 2013 to 22 April 2014. It means that the policy begun at 12am midnight on 23 April 2013. The fact that the payment for the policy was made at 8.27pm on 23 April 2013 did not determine the period of the policy. In the circumstances, it was clear that the policy would cover the damage of the vehicle caused in the accident as well as a third party risks claim. (paras 18, 20, 25 & 27)

(2) Etiqa Takaful's agent ought to make an inquiry because he would have known that the insured period will include a past period. In this instant case, Etiqa Takaful's agent took upon himself that everything was alright and accepted the payment without enquiring whether the vehicle to be insured had met any accident earlier in the day. In the event the insured person did not disclose the true facts to the agent when asked, then it would tantamount to fraud which would be sufficient to render the policy void. If Etiqa Takaful's agent had asked, he would have discharged his responsibility. The omission is a waiver of right to information. Therefore, the principle of utmost good faith could not be applied. (paras 37-40)

(3) 'Insurance is a contract upon speculation ...', 'speculation' refers to something which is not known to be a fact. In this instant case, an accident involving vehicle PGE 877 in the morning of 23 April 2013 is a fact. Etiqa Takaful could have easily discovered this fact. But, Etiqa Takaful accepted the premium and took the risk which could have been easily avoided. Therefore, Etiqa Takaful could not now disclaim any liability for its own carelessness or omission. (para 42)

(4) The intention of Parliament is to ensure a party who suffers injury and damage to his property will be compensated through an insurance company against the party who is at fault. An insurance company plays an important role in this social organisation. To shield behind s. 96(3) of the Road Transport Act 1987 from liability to a third party risks claim is against the spirit of the intention of Parliament. Etiqa Takaful should not be protected under s. 96(3) of the Road Transport Act 1987 for its own omission or carelessness which is tantamount to a waiver of information, Etiqa Takaful's also could not rely on the principle of utmost good faith. (para 44)

Case(s) referred to:

Carter v. Boehm (1766) 97 ER 1162 ***(dist)***

Goh Chooi Leong v. Public Life Assurance Co Ltd [1963] 1 LNS 30 HC ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 96(3)

For the appellants - HT Tiong; M/s NM Tiong & Co
For the respondents - Mohd Dasuki Mat Noh; M/s VP Nathan & Partners

[Editor's note: Appeal from Sessions Court; Originating Summons No: A54-06-03-2015]

Reported by Sandra Gabriel

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] The respondent, Etiqa Takaful Berhad, is an insurance company.

[2] The respondent filed an originating summons at the Sessions Court, Alor Setar, *via* Case No. A54-06-03-2015 (hereinafter referred to as the "OS"), seeking for the relief of declaration to the effect that a motor vehicle insurance policy (hereinafter referred to as the "policy") under Certificate No. TGPC-PC849312-BRTNSGP (hereinafter referred to as the "certificate") was void or unenforceable.

[3] On 5 October 2015, the Sessions Court Judge (SCJ) allowed the respondent's application. The policy was declared void or unenforceable.

[4] The appellants, being the third and fourth respondents in the OS, were not satisfied with the decision of the SCJ. They appealed to the High Court. The appeal was heard before me. On 23 February 2016, I allowed the appeal and set aside the SCJ's order.

[5] The respondent was not satisfied with my ruling. On 16 March 2016, the respondent filed a notice of appeal to the Court of Appeal against my ruling. This judgment serves as the reason(s) for my decision.

The Factual Background

[6] The respondent was the insurer of the policy.

[7] Muhamad Ghozali bin Che Isa was the second respondent named in the OS. He was the owner of a motor vehicle PGE 877 (hereinafter referred to as "the vehicle PGE 877") which was the vehicle that the policy covered in the event of any loss or damage, including liability for third parties' claims.

[8] Siti Nur Atikah binti Che Isa was the first respondent named in the OS. She was the authorised driver of the vehicle PGE 877 other than Muhamad Ghozali bin Che.

[9] On 23 April 2013, around 10.15am, the first appellant (who was the third respondent named in the OS) was riding a motorcycle bearing registration no KCF 7580. The first appellant's motorcycle collided with the vehicle PGE 877. At the time of the accident, the vehicle PGE 877 was driven by the first respondent (in the OS).

[10] The second appellant was the fourth respondent named in the OS. He was the owner of the motorcycle KCF 7580.

[11] The appellants took out a civil suit at the Magistrate Court, Alor Setar *via* Case No. A73KJ-459-06-2014 against the first and second respondents (in the OS) for the accident that occurred on 23 April 2013. The appellants were the plaintiffs and the first and second respondents were the defendants in the civil suit at the Magistrate Court.

[12] Before the trial at the Magistrate Court could begin, on 30 March 2015, the respondent through a firm of solicitors, Messrs VP Nathan & Partners, filed the OS at the Sessions Court, Alor Setar, seeking a declaration to the effect that the policy, *vis-a-vis* the certificate, was void or unenforceable.

[13] The effect of the declaration would discharge the respondent, as an insurer, from any liability for a third party risks claim in the policy, *id est*, the appellants' claim (as plaintiffs) in the Magistrate Court against the first and second respondents (in the OS) as the defendants.

The Respondent's Case

[14] The reason(s) the respondent relied on as to why the policy was void or unenforceable was that the insured person (second respondent in the OS) had purchased the policy on or around 8pm on 23 April 2013. He purchased the policy through one of its agents by the name of Mohammad Azim bin Azmi. In other words, the policy only took effect after payment was received by the respondent around 8pm on 23 April 2013.

[15] The respondent argued that since the accident occurred earlier in the day, around 10.15am in the morning on 23 April 2015, and the policy took effect around 8pm on 23 April 2015, therefore, the respondent could not be held liable as the insurer in the policy. The period which the policy covered was from 8.27pm (to be exact) on 23 April 2013 to 22 April 2014, it was argued.

[16] The respondent's counsel in his written submission submitted as follows:

> 9. Responden/Pemohon dan Responden Kedua telah memasuki suatu kontrak insuran pada (Ekshibit "A-1") di mana m/kar tersebut diinsurankan oleh Responden/Pemohon untuk suatu jangka masa 23/4/2013 pada pukul 8.27 malam sehingga 22/4/2014.

[17] The respondent's counsel further submitted as follows:

> 14. Responden/Pemohon berhujah bahawa ini adalah satu kes di mana Muhamad Ghozali bin Che Isa hanya memperbaharui polisi insurans selepas kemalangan untuk membuat tuntutan insurans. Ini tidak sepatutnya dibenarkan kerana pada masa kemalangan, Responden/Pemohon bukanlah penanggung insurans untuk m/kar tersebut.

The Finding Of This Court

The Insured Period

[18] During the hearing of the appeal, I referred both parties' counsels to the respondent's document entitled "The Schedule" and "Private Car Certificate" which are found in pp. 8 to 13 of the rekod rayuan tambahan 1.

[19] In "The Schedule", in particular, on the right hand corner where it stated specifically the period of time the policy would cover. It stated as follows:

> Period of Takaful from 23/04/2013 To 22/04/2014 (both Dates inclusive). Any subsequent period for which the participant shall pay and the Takaful Operator shall agree to accept a renewal contribution.

[20] It was stated clearly that the insured period was between 23 April 2013 to 22 April 2014. It means the policy begun at 12am midnight on 23 April 2013. The accident occurred around 10.15am on 23 April 2013, certainly, the accident was within the insured period.

[21] The respondent's counsel argued that the policy only begun or took effect around 8.27pm. I was not satisfied with the submission. I sought the respondent's counsel to guide the court as to whether there was in the policy a clause that says the period of the policy shall begin at the time the insurer received payment. The respondent's counsel could not find any clause in the policy to that effect.

[22] The respondent's counsel in his hujahan bertulis tambahan & ikatan autoriti-autoriti responden/pemohon submitted an e-mail written by a person by the name of Nuratikhah stating as follows:

> Hi Gladys,
>
> Take note that the time of purchase of the policy (PC849312) is on 23/04/2013 8:27:34 PM.

[23] I could not accept the content of the above e-mail could assist the court or support the respondent's case. The respondent's counsel in his written hujahan tambahan stated as follows:

> Hujahan ini adalah hujahan tambahan untuk menunjukkan bahawa polisi insurans tersebut hanya dikeluarkan pada 23/4/2013 pukul 8:27:34 pm iaitu selepas kemalangan tersebut dikatakan berlaku.
>
> ....

Responden/Pemohon berhujah bahawa permohonan Responden/Pemohon untuk deklarasi seharusnya dibenarkan berdasarkan alasan di atas yang dengan jelasnya menunjukkan bahawa pada masa kemalangan, m/kar No. PGE 877 tidak dilindungi oleh Responden/Pemohon kerana polisi insurans tersebut hanya diperbaharui pada pukul 8.27 malam, maka tiada 'insurable interest'.

[24] I was not persuaded by the respondent's counsel's submission. The submission by the respondent's counsel was not supported by any principle of law.

[25] The insured period was clearly stated to be from 23 April 2013 to 22 April 2014 in "The Schedule" of the policy. Since the accident occurred on 23 April 2013 around 10.15am which was within the insured period, it was clear the policy would cover the damage of the vehicle caused in the accident as well as a third party risks claim.

[26] The policy was a contract between the respondent and the first and second respondents (in the OS). The appellants were not privy to the policy. What transpired between the respondent's agent and the second respondent (the insured person) was not of the appellant's concern. The respondent had accepted responsibility as an insurer when it issued "The Schedule" stating the insured period of the policy commenced on 23 April 2013, ie, the policy once it took effect covered the period starting from 12am on 23 April 2013.

[27] The fact that the payment for the policy was made at 8.27pm on 23 April 2013 does not determine the period of the policy, the period of the policy is what is stated in the schedule.

The Principle of "Utmost Good Faith"

[28] In the written submission of the respondent's counsel, it was submitted, *inter alia*, that the principle of *uberrimae fide* or "utmost good faith" should be applicable in this case.

[29] The respondent's counsel cited the cases of *Goh Chooi Leong v. Public Life Assurance Co Ltd* [1963] 1 LNS 30; [1964] 1 MLJ 5 and the landmark decision of Lord Mansfield in *Carter v. Boehm* (1766) 97 ER 1162 / (1766) 3 Burr. 1905 which established the principle of "utmost good faith" in an insurance contract.

[30] In *Carter v. Boehm*, Mr Carter took out an insurance policy with Boehm to insure a fort built in the island of Sumatra. The insurance was supposed to insure against foreign enemy invasion for a year, from 16 October 1759 to 16 October 1760. Within the insured period, the fort was attacked by the French. Carter made a claim against Boehm. Boehm refused to honour the insurance contract. It was argued that Mr Carter did not disclose the facts that the fort was not a fort built or designed to resist European enemies, it was meant only to defend natives of the island. These crucial facts were concealed from Boehm, Boehm's counsel argued.

[31] The respondent's counsel drew the court's attention to the oft-quoted passage of His Lordship's judgment, and it reads as follows:

> Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the *risque* as if it did not exist ... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

[32] The respondent's counsel submitted that the insured person did not disclose to the respondent's agent that the vehicle PGE 877 was involved in an accident in the morning on 23 April 2013. This non-disclosure of fact had misled the respondent's agent into the belief that the vehicle was free from accident earlier in the day on 23 April 2013. Hence, the respondent's agent accepted the payment in utmost good faith. Premised on this fact, the policy ought to be declared as void or unenforceable, the respondent's counsel argued. The submission was persuasive, but I was not prepared to accept it.

[33] I observe in His Lordship's judgment, in particular, the following wording:

> ... the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the *risque* as if it did not exist ...

[34] The above passage clearly stated a representation was made to the underwriter, and it is based on that representation that a trust is established. It is based on that trust the underwriter agreed to accept and to provide an insurance coverage. It is based on that trust the underwriter is in the belief he was not being misled by the insured person's representation.

[35] Lord Mansfield went on to hold that the duty was reciprocal and that if an insurer withheld material facts, the example cited being that an insured vessel had already arrived safely, the policyholder could declare the policy void and recover the premium.

[36] Lord Mansfield proceeded to qualify the duty of disclosure, citing from law report (1766) 3 Burr 1905 at pp. 1909-11, I quote as follows:

> The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon…This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his

> ignorance of the thing concealed. There are many matters, as to which the insured may be innocently silent - he need not mention what the under-writer knows ...
>
> An under-writer cannot insist that the policy void, because the insured did not tell him what he actually knew; what way so ever he came to the knowledge. The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of (emphasis added).
>
> The under-writer needs not be told what lessens the *risqué* agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculations: as for instance - The under-writer is bound to know every cause which may occasion natural perils; as the difficult of the voyage - the kind of seasons - the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, etc.
>
> If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere - he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waves the information ...
>
> The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

[37] In this instant case, there was no representation made to the respondent's agent. The respondent's agent took upon himself that everything was alright. He accepted the payment without enquiring whether the vehicle to be insured had met any accident earlier in the day. If he had asked, he would have discovered it.

[38] The respondent's agent ought to make an inquiry because he would have known that the insured period will include a past period. In the event the insured person did not disclose the true facts to the agent when asked, then it would tantamount to fraud which would be sufficient to render the policy void.

[39] If the respondent's agent had asked, he would have discharged his responsibility. The omission, I think, is a waiver of right to information. The above passage of His Lordship acknowledges certain circumstances where non-disclosure of certain facts by the insured could not render the policy void. One of which is the underwriter waives his right to certain information being informed of.

[40] In this instant case, the respondent's agent knew that the insured period will include a past period, but he did not ask. The omission was a waiver of information, because the respondent or the respondent's agent knew the insured period will cover the past period, and yet, the respondent or respondent's agent did not take any step to find out if any accident had occurred before that. In these circumstances, I think the principle of "utmost good faith" could not be applied.

[41] I am of the opinion that when an underwriter or its agents accept payment of a premium for an insurance policy with the insured period that covers a past period of time, it is incumbent upon the underwriter or its agents to make enquiries as to whether any risk covered by the policy had occurred during the past period of time.

[42] As Lord Mansfield stated: "Insurance is a contract upon speculation…." "Speculation" refers to something which is not known to be a fact. In this instant case, an accident involving the vehicle PGE 877 in the morning of 23 April 2013 at 10.15am is a fact. The respondent could have easily discovered this fact. But, the respondent accepted the premium and took the risk which could have been easily avoided. Therefore, I am of the considered view that the respondent could not now disclaim any liability for its own carelessness or omission.

[43] The facts in this instant case can be distinguished from *Carter v. Boehm* in that the former involved an insured past period, whereas, the later involved an insured future period.

[44] In closing, this court observes that it is compulsory for all motor vehicles in the country to be insured for a third party risks claim under the Road Transport Act 1987. The intention of Parliament is to ensure a party who suffers injury and damage to his property will be compensated through an insurance company against the party who is at fault. An insurance company plays an important role in this social organisation. To shield behind s. 96(3) of the Road Transport Act 1987 from liability to a third party risks claim is against the spirit of the intention of Parliament. The respondent in this instant case should not be protected under s. 96(3) of the Road Transport Act 1987 for its own omission or carelessness which is tantamount to a waiver of information, and the respondent could not rely on the principle of "utmost good faith" in this peculiar set of facts.

Conclusion

[45] Based on the above reasoning I allowed the appeal and set aside the Sessions Court order dated 5 October 2015 with costs of RM2,000 to be paid by the respondent to the appellants.